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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 274

BUTLER BROTHERS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 3 (1)–3 (7)) [1] is reported in 134 F. (2d) 981. The findings of fact, conclusions of law, and order of the National Labor Relations Board (P. A. 60–96) are reported in 41 N. L. R. B. 843.

[1] The appendices filed by the petitioner and the Board in the court below are referred to as "P. A." and "B. A.," respectively. The printed proceedings in the court below are referred to as "R."

JURISDICTION

The decree of the Circuit Court of Appeals was entered June 4, 1943 (R. 6–8). The petition for a writ of certiorari was filed on August 19, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Sections 10 (e) and (f) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 24–28.

QUESTIONS PRESENTED

1. Whether the unfair labor practices of an employer extensively engaged in interstate commerce and operating, as part of its business, a building leased to tenants who are there engaged generally in the manufacture, sale and distribution of goods and merchandise throughout the United States, affect commerce within the meaning of the Act.

2. Whether there is substantial evidence to support the findings of the Board, which were sustained by the court below, that (a) petitioner ostensibly divested itself of its employer status for the purpose of thwarting the organizational rights of its employees, (b) that it discriminated with respect to the hire and tenure of nine named employees, and (c) that by these and other acts peti-

tioner interfered with, restrained and coerced its employees in the exercise of their organizational rights, in violation of Section 8 (1) and (3) of the Act.

3. Whether the Act authorizes an award of back pay independent of reinstatement.

4. Whether in the circumstances of this case, the cease and desist provisions of the Board's order are unduly broad.

5. Whether the court below abused its discretion in refusing to remand the case to the Board for a specific determination of the amount of back pay due under the Board's order.

STATEMENT

Upon the usual proceedings the Board issued its findings of fact, conclusions of law and order (P. A. 60–96).[2] Insofar as is here material,[3] the facts as found by the Board and as shown by the evidence may be summarized as follows:

1. Commerce

Petitioner, an Illinois corporation having its principal offices and place of business in Chicago, Illinois, admitted it was extensively engaged in in-

[2] In the following statement the references preceding the semi-colons are to the Board's findings and the succeeding references are to the supporting evidence.

[3] The Board's order was directed to two parties: petitioner and Alex Wasleff, an individual doing business as Alex Wasleff Building Maintenance Co., hereinafter referred to as Wasleff. The latter does not seek review by this Court.

terstate commerce in the general conduct of its wholesale merchandising business (P. A. 63–64; 35–36, 42, 922–924, B. A. 35–36, see also Pet. Br. 10). Within Chicago, petitioner operates twin 15-story buildings known as Buildings A and B (P. A. 64; 563, 661–662). Petitioner has its Chicago store and warehouse in the former but occupies only about 16% of the 997,000 square feet of space in the latter, the remainder of which is leased to over 40 tenants[4] who utilize the space leased largely as warehouses and offices and in some instances for manufacturing (P. A. 64; 924–950, B. A. 13–34). During 1939 the value of interstate shipments received at Building B by these tenants approximated more than $4,000,000 while their out-of-state shipments from the building were valued at more than $2,500,000 (P. A. 64; B. A. 13–34).

The employees here involved, approximately 20 in number, are engaged in maintenance functions in Building B, serving as elevator operators, watchmen, and janitors (P. A. 64–65; 37, 43, 47, 857). They all perform a service directly connected with and for the benefit not only of petitioner but of the numerous tenants in Building B. The elevator operators run the three pas-

[4] In passing upon the case, the Board did not consider data with respect to one of the tenants, the United States Rubber Co., which maintains its own maintenance staff (P. A. 64; 565, 402).

senger elevators and the nine freight elevators in the building (P. A. 64–65; 567, 569, 222–223). The passenger elevators carry employees and the general public to and from the various offices and warehouses in the building (P. A. 65; 150, 314). The freight elevators transport the incoming and outgoing freight and mail of petitioner and of its tenants between the loading platforms and the offices or warehouses in the building (P. A. 65; 927–950, 162, 229–230, 273–278, 314–315, 320–321, 622–624).[5] The watchmen guard the building and its contents (P. A. 65; 173–175, 230–231, 991–999). The janitors clean and maintain the common stairways, lobbies, and lavatories and frequently operate the elevators as relief operators (P. A. 65; 190, 567, 614–615, 1002–1007).

Upon the basis of the foregoing facts, the Board found that petitioner's unfair labor practices affected commerce within the meaning of the Act (P. A. 65, 92).

[5] The freight elevator operators not only run the elevators but frequently assist in the physical handling of the goods by pushing the freight on and off the elevators and by "lining up" the merchandise in the hallways in an orderly manner to prevent obstruction of the passageways (P. A. 65; 176–177, 190, 229, 273–278, 314–315, 320–322, 519, 665, 614–615, 927–950). Frequently, they also receive bills of lading from shipping companies and deliver such bills of lading to the tenants receiving the goods (P. A. 65; 277–278, 321). The leases of some of the tenants provide that their merchandise is to be handled by the elevator operators (P. A. 65; 928, 936, 940, 665, 274, 615–616).

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2. The Unfair Labor Practices

In the early part of April 1939 a large number of the employees joined the Union[6] and it attempted to bargain collectively with petitioner (P. A. 66; 105–106, 211, 227, 243, 256, 269, 279–280, 330, 374, 381, 406, 667–671, 693, 642–644, B. A. 41–42). Petitioner promptly set about to discourage the union activities of its employees. Harlan, petitioner's executive in charge of maintenance (P. A. 69; 571, 688), approached employees Ward and Ledford, two outstanding union advocates, and on several occasions, variously denounced the Union to them. He urged them "not to fool with these organizations," as "they would not do you any good," that "they charge big dues," "force you to join" and "promise you a lot of money but they don't give it to you," warned them that petitioner would not "stand for any union in Building B" and that "we could let this building out to a maintenance company and we wouldn't

[6] Elevator and Operator Starters Union Local No. 66 and the Federal Labor Union Local 20475, sometimes referred to in the record as Wholesale Merchandisers' Union (P. A. 425), both of which are affiliated with the American Federation of Labor, were both involved in these proceedings (P. A. 66). The employees first joined Local 66 (P. A. 66), dropped out of it (P. A. 67), and joined Local 20475 (P. A. 68), which a majority of the maintenance employees had joined by May, 1940 (P. A. 68). Soon the membership was transferred to Local 66 (P. A. 74). When in the text it becomes necessary to specify the particular locals, reference will be made to them as "Local 20475" or "Local 66"; otherwise, both will be referred to indiscriminately as the "Union."

have to bother with unions at all." Harlan pointed out that the use of a maintenance company would result in many of the senior employees losing their jobs and he "would hate to see * * * any of [the] fellows lose their jobs on account of the Union" (P. A. 66–67, 69; 105, 107–111, 269, 270–271, 279). On another occasion Harlan informed Healy, an elevator operator in Building B, that petitioner was increasing the wages of elevator operators to $120 a month, and warned him that "the Company will not stand" for the "boys joining any union or having anything to do with unions" (P. A. 68, 69; 205). Union activity subsided during the summer and fall of 1939 (P. A. 67; 151–152, 163, 418).

With the revival of union activity in late 1939 and early 1940, Harlan threatened Ledford with discharge because he had accepted the position of union steward, repeated that petitioner was resolved to let out its maintenance work rather than deal with a union and warned again that such a step would result in the loss of work for many of the "old" employees (P. A. 68–69; 112–115, 951).[7] By May 1940 a large majority of the maintenance employees had applied for membership in the Union (P. A. 68; 106, 108, 193, 204,

[7] Harlan also informed Ledford at this time that petitioner had negotiated with a building contractor in May 1939, but that no contract had been made at that time (P. A. 114–115, see note 8, *infra*, p. 8).

227, 243, 268, 281, 306, 317, 330, 365–367, 382, 406, 421, 512–513).

Thereupon, petitioner fulfilled its threat to relinquish the maintenance work to an outside concern if union activity persisted (P. A. 70–71; 457–458, 683, 574–575).[8] In June 1940 petitioner let out its maintenance work to Maintenance Contractor Wasleff. The contract was dated June 6, 1940, and became effective July 1, 1940 (P. A. 71; 683, 689, 987,

[8] Petitioner first manifested an interest in the services of Maintenance Contractor Wasleff in the spring of 1939, at about the same time that the Union made its appearance in Building B (P. A. 569–570, 791); its interest declined when the Union lost its organizational impetus (P. A. 571, 626). Wasleff resumed solicitation of the maintenance work in November 1939 and from then until February 1940 Wasleff and his chief assistant, Stanley Sando, conferred with Harlan on numerous occasions and were told petitioner remained undecided as to whether it would relinquish the maintenance work to a contractor (P. A. 571–572, 626–627). On March 14, 1940, Harlan called Wasleff to his office and requested him to submit a bid upon the maintenance work in Building B (P. A. 69; 986–987, 572–573, 951). The next day Wasleff wrote Harlan that he would perform the maintenance work requested in accordance with petitioner's specifications at "present pay-roll cost only" (P. A. 70; 986–987). On or about May 1, 1940, Harlan was directed by his superior to accept Wasleff's bid and he proceeded to prepare with Wasleff and Sando, Wasleff's chief assistant, the detailed specifications to be embodied in the prospective contract (P. A. 70; 683, 574, 621, 689, 812–813, 794). Sometime in May, the Union proffered petitioner a proposed contract and at an ensuing conference, the union representative was told by petitioner that it "was considering letting out its maintenance work to an outside concern" (P. A. 70–71; 671–672, 457–458).

990–991). The operation of the maintenance work in Building B was, however, little changed by the terms of the contract and the manner in which the parties performed pursuant thereto (P. A. 71–72, 73–74, 75–76; 647–648, 991–1008); Harlan continued to supervise the work of the maintenance employees and to issue direct orders to them almost exactly as he had done before the contract (P. A. 72, 75; 118–119, 164, 170, 187–188, 386, 658, 952–965). Petitioner, through Harlan and other of its officials, also continued to exercise an authoritative control over the hire and tenure of employment and the labor relations policies affecting the employees in Building B (P. A. 72, 73, 74–75; 288–289, 464–465, 830–831, 125–128, 963, 294, 483–485, 488, 494–495, 676–681). This exercise of authority was accepted by Wasleff and the maintenance employees without question (P. A. 74–75; 119, 131–132, 165–166, 170–171, 174, 178–179, 188, 197–198, 206–207, 209, 231, 233–234, 239, 243, 245, 248, 254, 290–291, 307, 315, 359–360, 378–379, 390–391, 397–398, 409, 468, 488–489, 916, 963, 985, 1009–1034, 1042–1043).

The labor relations policy in Building B subsequent to the effective date of the contract continued to be one of unrelenting hostility to the Union; the supervisors who were admittedly employees of petitioner as well as those allegedly Wasleff's employees, questioned the employees

about their union affiliations, rebuked them for the "injustice" they had done petitioner by their union activities, attempted to persuade them to report the presence of any union officials in the building to petitioner or to Wasleff, disparaged the Union leaders as "Reds," "Communists," and "bad apples" which had "spoiled" the whole barrel by their organizational effort, stated that one supervisor's job was to see that the employees were removed from the building in a manner to avoid the appearance of illegality, and announced flatly that a union was not wanted in Building B (P. A. 78–79, 81, 83–84, 86–88; 131–134, 306–307, 228, 288–289, 423–424, 203–204, 294).

The immediate result of the contract, so far as the maintenance employees were concerned, was that upon their transfer to Wasleff's pay roll, although their nominal wages were not at once reduced,[9] they lost seniority rights, rights to sick benefits, paid vacations based on length of service, and the privilege of participating in certain group

[9] Wasleff was obligated, under the contract, to take over and employ all of petitioner's employees who were engaged on July 1 in rendering the services proposed to be furnished by Wasleff and to retain such employees for a period of at least 30 days from July 1 at the same wage rates paid by petitioner (P. A. 989). The sum which petitioner agreed to pay Wasleff amounted to petitioner's monthly pay-roll cost for the maintenance work of the time of the execution of the contract, plus a small additional amount to cover the wage of persons hired temporarily to replace regular maintenance employees taking paid vacations which petitioner usually granted its employees (P. A. 71; 989, 648, 631–632).

life and hospitalization plans, all of which they had theretofore enjoyed as employees of petitioner (P. A. 89; 1040–1044, 136–137). The subsequent result was that petitioner's threat that a number of "old" employees would lose their jobs was fulfilled; nine employees,[10] each of whom had seen substantial service with petitioner, were transferred from Building B to other buildings serviced by Wasleff, soon after Wasleff's obligation to maintain petitioner's staff intact expired; seven of the nine [11] were discharged within a short time after their transfer, and none of the nine has been reinstated to his position in Building B. All were active union members (P. A. 87–88; Ward: 77–78; 262, 268, 279, 108. Healy: 78–79; 201–202, 204. Ledford: 79–81; 99–100, 105–108. Zeman: 81; 504–505, 512–514. Pukis: 81–82; 369–371, 373–374. Fitzpatrick: 82; 401–406. Warzecha: 82; 189, 191–193, 195–196, 200. Harrity: 82–83; 225–228. Malavasi: 83; 418–422). The first three to be removed were Ward, Healy and Ledford—the three whom petitioner had warned directly that it would not tolerate union activity in Building B (P. A. 87; 263, 203–204, 101–103, *supra,*

[10] Ward, Ledford, Healy, Zeman, Pukis, Warzecha, Harrity, Fitzpatrick, Malavasi (P. A. 88).

[11] Healy, an elevator operator, was offered a janitor's job which he refused (P. A. 78; 203–204). Malavasi and Warzecha, both of whom ceased their union activities shortly after the transfer, were still working elsewhere for Wasleff at the time of the hearing (P. A. 82, 84, 87; 196–197, 200, 422, 191–192, 426, 428).

pp. 6, 7). Also soon removed from the building were Fitzpatrick, to whom Sando, who directly effected most of the transfers, remarked that he would have no trouble obtaining another job because he was a union man (P. A. 82, 87; 405), and Harrity, who had soon after July 1, 1940, informed Wasleff of his union affiliation and that of the other maintenance employees (P. A. 83, 87; 227–228).

From the foregoing findings the Board concluded that by the anti-union statements of petitioner's supervisory employees and by the agreement of June 6, 1940, petitioner interfered with, restrained and coerced the employees in the exercise of the rights guaranteed in Section 7 of the Act, deprived the employees of valuable perquisites of employment, and further discriminated with respect to the hire and tenure of the nine employees removed from Building B and thereby discouraged membership in the Union in violation of Section 8 (1) and (3) of the Act (P. A. 69–70, 88–89). The Board held further that the contract of June 6, 1940 did not terminate the employment relationship theretofore existing between petitioner and the maintenance employees (P. A. 76), and that under the provisions of Section 2 (2) of the Act, Wasleff was jointly responsible with petitioner for the unfair labor practices committed subsequent to the contract (P. A. 88–89).

Insofar as here material, the Board's order required petitioner to restore to all the maintenance employees the same or substantially equivalent rights and privileges they had possessed before the contract by taking "whatever steps may be necessary including modification or cancellation of its contract with Wasleff" (P. A. 96); to cease and desist from its unfair labor practices and from in any other manner interfering with the rights guaranteed in Section 7 of the Act (P. A. 95); to reinstate to their former or substantially equivalent positions in Building B eight of the employees (P. A. 92–93, 95);[12] to make whole the nine employees discriminated against (P. A. 95); and to post appropriate notices (P. A. 96).

On March 31, 1943, the court below handed down its opinion enforcing the Board's order with modifications not here in issue (R. 3 (2)–3 (7)). On April 14, 1943, petitioner requested a rehearing which the court denied on May 21, 1943, and on June 4, 1943, a decree was entered (R. 4–8).

ARGUMENT

1. COMMERCE

Petitioner's contention (Pet. 26–28) that the Act may not be applied to its operations in Building B is without merit. The court below, upon a full consideration of the facts, properly upheld

[12] Malavasi did not desire reinstatement in Building B. (P. A. 92; 438).

the Board on the issue of the Act's applicability to these operations. Its holding presents neither a conflict of decisions nor a novel question.

Petitioner does not dispute that it is engaged in interstate commerce within the meaning of the Act (*supra*, pp. 3–4); but it insists that its labor relations with the maintenance employees in Building B should be regarded as separate and distinct from its relationship with the employees engaged in the interstate aspects of its business. However, it is well settled that if the business of an employer as a whole substantially affects interstate commerce, the Act is applicable to all of the employees irrespective of whether the specific employees involved in the unfair labor practice are themselves engaged in activities which if viewed alone would afford a basis for applying the Act. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 476, expressly approving on this point, 115 F. (2d) 414, 416 (C. C. A. 4).[13]

[13] Accord: *Williams Motor Co.* v. *National Labor Relations Board*, 128 F. (2d) 960, 963–964 (C. C. A. 8); *National Labor Relations Board* v. *Schmidt Baking Co.*, 122 F. (2d) 162, 163–164 (C. C. A. 4). Cf. *Virginian Ry.* v. *Federation*, 300 U. S. 515, 556. That there is a probability that all groups may join in striking against unfair labor practices committed directly against only one group is graphically illustrated by the record in this case. Petitioner's witnesses testified that, following the settlement of a dispute which had resulted in a strike of its warehouse employees, many of these employees nevertheless refused to return to work until the maintenance employees in Building B had been reinstated (P. A. 964, 690).

Furthermore, the activities of the maintenance employees here involved, if viewed alone, clearly affect the flow of commerce and therefore are subject to the Act. Sec. 10 (a), Appendix, *infra*, p. 27. Cf. *Kirschbaum Co.* v. *Walling*, 316 U. S. 513.

The fact that during a labor stoppage petitioner was able to continue operations by obtaining other employees does not, as petitioner argues, defeat the Act's applicability (Pet. 27–28; Pet. Br. 99–100). For the purposes of the Act, it is immaterial that commerce has not in fact been affected or might not be affected because substitute arrangements could be obtained elsewhere. *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U. S. 318, 326; *North Whittier Heights Citrus Ass'n* v. *National Labor Relations Board*, 109 F. (2d) 76, 82, certiorari denied, 310 U. S. 632; *National Labor Relations Board* v. *Bank of America*, 130 F. (2d) 624, 626, certiorari denied, 318 U. S. 791; cf. *Virginian Ry.* v. *Federation*, 300 U. S. 515, 557.

2. Substantial Evidence

Petitioner's contention that the Board's findings are not supported by substantial evidence (Pet. 10–24) presents no question warranting review. Moreover, it is without merit.[14] The

[14] *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. (2d) 586 (C. C. A. 2), upon which petitioner relies for a conflict, has been confined to its facts. *National Labor*

Board's finding that petitioner entered into the contract with Wasleff for the purpose of evading its obligations under the Act (P. A. 88–89) is amply supported by the evidence (see Statement, pp. 6–12, *supra*), as the court below held (R. 3 (5)–3 (7)). This finding by itself justifies every provision of the order against petitioner.[15] The

Relations Board v. *Cities Service Oil Co.*, 129 F. (2d) 933, 937 (C. C. A. 2). This Court has recently denied certiorari where similar contentions of conflict with the *Air Associates* case were made. *Stonewall Cotton Mills* v. *National Labor Relations Board*, 129 F. (2d) 629 (C. C. A. 5), certiorari denied, 317 U. S. 667; *National Labor Relations Board* v. *Martin Bros. Box Co.*, 130 F. (2d) 202 (C. C. A. 7), certiorari denied, 317 U. S. 660; *National Labor Relations Board* v. *Gerity Whitaker Co.*, decided June 1, 1942, 10 L. R. R. 494 (C. C. A. 6), certiorari denied, 318 U. S. 763.

[15] The Board's findings of violations of Section 8 (3) of the Act by similar employer conduct have been repeatedly upheld by the courts. Compare, for example, the strategic abolition of an entire department and the installation of an independent contract system by the bank "in order to rid itself of an undesired nucleus of union members and sympathizers," in *National Labor Relations Board* v. *Bank of America*, 130 F. (2d) 624, 629 (C. C. A. 9), certiorari denied, 318 U. S. 791. See also *National Labor Relations Board* v. *Wilson Line, Inc.*, 122 F. (2d) 809 (C. C. A. 3), where the employer utilized the weapon of discharge "to break the union strength * * * by changing the preponderant character of the crew to one having no definite character"; *Williams Motor Co.* v. *National Labor Relations Board*, 128 F. (2d) 960 (C. C. A. 8), where an entire department was shut down in order to evade the obligations of the Act; and *National Labor Relations Board* v. *Gerity Whitaker Co.*, decided June 1, 1942, 10 L. R. R. 494 (C. C. A. 6), certiorari denied, 318 U. S. 763, where a "runaway shop" was established as a separate corporation in order to evade a collective labor

Board in addition to finding the contract an evasion device, also found that petitioner continued, after the contract was in effect, to exercise control over the labor relations and conduct of maintenance employees and thus continued to be their employer for the purposes of the Act (P. A. 72–76, 85–86). This finding is likewise supported by the evidence (see Statement, *supra*, pp. 9–10), was upheld by the court below (R. 3 (5)), and affords an independent basis for the order against petitioner (Section 2 (2) of the Act, Appendix, *infra*, pp. 25–26).[16]

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agreement. A group of Gerity Whitaker's employees who had never been employed at the second plant were laid off solely because of reduced business. The court sustained the Board's finding that since the reduction in personnel would not have occurred but for the illegal establishment of the "runaway shop," the lay-offs were violative of the Act. The court accordingly enforced the Board's order directing both corporations to offer reinstatement at either plant to the laid-off employees (33 N. L. R. B. 393, 425).

[16] In the following cases orders against multiple employers were upheld: *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 263; *National Labor Relations Board* v. *Condenser Corp.*, 128 F. (2d) 67, 71 (C. C. A. 3); *National Labor Relations Board* v. *Baldwin Locomotive Works*, 128 F. (2d) 39, 43 (C. C. A. 3); *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 182 (C. C. A. 6); *National Labor Relations Board* v. *Swift & Co.*, 127 F. (2d) 30, 31 (C. C. A. 6); *National Labor Relations Board* v. *Grower-Shipper Vegetable Co.*, 122 F. (2d) 368, 378 (C. C. A. 9); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641, 648, 650 (App. D. C.). Cf. *Meek* v. *United States*, 136 F. (2d) 679 (C. C. A. 6), under the Fair Labor Standards Act.

Finally, petitioner contends (Pet. 29–31) that the decision of the court below affirming the Board's findings as supported by substantial evidence reflects a misapprehension of the true meaning of the decisions of this Court with respect to the proper scope of judicial review. This is the second case decided within the year in which Judge Major, speaking for the Seventh Circuit Court of Appeals, has professedly abnegated jurisdiction to reverse administrative agencies. In the first of these cases, *City of Indianapolis* v. *Wheeler,* 132 F. (2d) 879 (C. C. A. 7), certiorari denied, 318 U. S. 781, that court refused to review an administrative decision in any respect because of a professed want of authority. A writ of certiorari was sought on the ground that appellate review had been denied.[17] The Government opposed, pointing out that the administrative decision was sound, and citing instances which showed that the Seventh Circuit Court of Appeals had in other cases showed itself cognizant of its powers on review of administrative decisions and not exceptionally reluctant to exercise them. Certiorari was denied. We believe that this case presents even less reason for review on this ground, be-

[17] A similar contention was unsuccessfully made in a petition for a writ of certiorari in *Wilson & Co.* v. *National Labor Relations Board*, 126 F. (2d) 114 (C. C. A. 7), certiorari denied, 316 U. S. 699.

cause here, notwithstanding the statements to which petitioner takes exception, the court did review the evidence and find substantial evidence supporting the Board's findings. Moreover, the court exercised its appellate powers by modifying the Board's order in two respects not here in controversy.

3. The Provisions of the Board's Order

Petitioner's contention (Pet. 22–23) that the inclusion in Section 10 (c) of the Act of the phrase "including reinstatement with or without back pay" operates as a qualification upon the power of the Board to remedy the consequences of illegal discrimination by ordering back pay without reinstatement, has been rejected by this Court. *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177. In that case, this Court expressly affirmed the decision of the Second Circuit Court of Appeals (113 F. (2d) 202, 205) enforcing the Board's order granting back pay to one of two men without reinstatement.[18] Similar provisions have been repeatedly enforced in numerous cases without discussion, although in some of these cases

[18] The question of the Board's power to order back pay without reinstatement was presented to this Court in the *Phelps Dodge* case and was argued fully by both the employer and the Board. See the Phelps Dodge Corp. brief to this Court, Nos. 387 and 641, at pp. 44–45, and the Government's brief at pp. 43–44.

they were in fact challenged by counsel for the employer.[19]

Petitioner contends (Pet. 25) that the provision of the order which restrains petitioner from in any manner infringing the rights guaranteed under Section 7 of the Act is invalid under the principles enunciated in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426. But in the *Express* case, this Court recognized that the "breadth of the order * * * must depend upon the circumstances of each case" (312 U. S., at 436). In that case there was only an isolated refusal to bargain collectively. In this case there is proof of numerous independent violations of Section 8 (1) which were of the same type as the order prohibits. This circumstance of itself suffices to support the order. Moreover, in this case the violations were so numerous and so varied and were committed with such open hostility to the Union

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[19] E. g. *Link-Belt Co.* v. *National Labor Relations Board*, 110 F. (2d) 506, 511–512 (C. C. A. 7), Board's order enforced in full, 311 U. S. 584; *Mooresville Cotton Mills* v. *National Labor Relations Board*, 94 F. (2d) 61, 66 (C. C. A. 4); *National Labor Relations Board* v. *Crystal Spring Finishing Co.*, 116 F. (2d) 669, 672 (C. C. A. 1); *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472 (C. C. A. 3), modified in other respects, 311 U. S. 7; *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 114 F. (2d) 849, 856–857 (C. C. A. 7), certiorari denied, 312 U. S. 680; *Indianapolis Power & Light Co.* v. *National Labor Relations Board*, 122 F. (2d) 757, 763 (C. C. A. 7); *National Labor Relations Board* v. *Skinner & Kennedy Co.*, 113 F. (2d) 667, 669, 672 (C. C. A. 8); *Continental Oil Co.* v. *National Labor Relations Board*, 113 F. (2d) 473, 485 (C. C. A. 10).

as to furnish ample basis to believe that other violations might occur unless restrained—a second sufficient ground for the broad type of order. Provisions like the one here in controversy were enforced in *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282; *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, and *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105. Contentions similar to that raised by petitioners were presented to this Court by the employers in *Owens-Illinois Glass Co.* v. *National Labor Relations Board*, 123 F. (2d) 670 (C. C. A. 6), certiorari denied, 316 U. S. 662; *Wilson & Co.* v. *National Labor Relations Board*, 126 F. (2d) 114 (C. C. A. 7), certiorari denied, 316 U. S. 699; *National Labor Relations Board* v. *Algoma Net Co.*, 124 F. (2d) 730 (C. C. A. 7), certiorari denied, 316 U. S. 706.

Petitioner apparently urges (Pet. 25–26) that the decision of the court below insofar as it denied petitioner's motion to remand the case to the Board for the specific determination of the amount of back pay due under Board's order,[20]

[20] The Board's back-pay order is in the usual form which this Court has enforced in numerous decisions. E. g. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, enf'g as modified, 4 N. L. R. B. 71, 108; *National Labor Relations Board* v. *Newport News Shipbuilding Co.*, 308 U. S. 241, enf'g as modified, 8 N. L. R. B. 866, 877; *National Labor Relations Board* v. *Waterman S. S. Corp.*, 309 U. S. 206, enf'g 7 N. L. R. B. 237, 252; *National Labor*

is in conflict with the decision of the Second Circuit Court of Appeals in *National Labor Relations Board* v. *New York Merchandise Co., Inc.,* 134 F. (2d) 949. No conflict exists, and the review of this Court is not necessary. In the *New York Merchandise* case, the employer first moved the Board for leave to adduce additional evidence which, if proved, would fix the specific amount of back pay due to a discriminatorily discharged employee. The proffered evidence was that on a certain specified date subsequent to the Board's order the position to which the Board had ordered that the employee be reinstated, ceased to exist, and no other position of the same grade and seniority was available. Following the Board's denial of this motion, the employer petitioned the court to remand the case to the Board and to compel it to hear the issues presented. The court granted the motion, noting that pursuant to this Court's opinion in *Southport Petroleum Co.* v. *National Labor Relations Board,* 315 U. S. 100, 106, it lay within its sound discretion as to which of two alternatives (*viz.,* remanding or permitting the question to be decided on contempt) it might choose; it was persuaded to accede to the employer's request in view of the character of the evidence sought to be adduced and the fact that

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Relations Board v. *Automotive Maintenance Machinery Co.,* 315 U. S. 282, enforcing 13 N. L. R. B. 338, 361; *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.,* 316 U. S. 105, enforcing 26 N. L. R. B. 1182, 1235–1239.

the employer had already requested the Board for an opportunity to present the evidence. In the instant case, petitioner has never presented its problem—if one in fact exists—to the Board in any manner. Cf. *Marshall Field Co.* v. *National Labor Relations Board,* 318 U. S. 253. In any event, petitioner's suggestion that there is a conflict of decisions lacks any rational foundation, since the method of procedure on compliance issues is discretionary with the court. *Southport Petroleum Co.* v. *National Labor Relations Board, supra.* Petitioner does not contend that the court below abused its discretion; indeed, upon the facts herein recited, it is clear that the court acted clearly within the purview of Section 10 (e) of the Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1943.